Mailed:
July 21, 2004

UNITED STATES PATENT AND TRADEMARK OFFICE

_____

Trademark Trial and Appeal Board

_____

In re Mountain Top Beverage Group, Inc.

_____

Serial No. 76347863

_____

B. Joseph Schaeff of Dinsmore & Shohl LLP for Mountain Top Beverage Group, Inc.

Geoffrey Fosdick, Trademark Examining Attorney, Law Office 111 (Craig Taylor, Managing Attorney).

_____

Before Simms, Seeherman and Rogers,
Administrative Trademark Judges.

Opinion by Rogers, Administrative Trademark Judge:

Mountain Top Beverage Group, Inc., applicant, has applied to register the mark HG VIPER for goods identified as "beer and malt liquor," in Class 32. The application is based on applicant's stated intention to use the mark in commerce on or in connection with the identified goods. The examining attorney has refused registration, under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), in view of the prior registration of VIPER on the Principal

Register for "beer, carbonated soft drinks and carbonated fruit juices," in Class 32.[1] An initial requirement that applicant disclaim the initials HG was withdrawn.

When the examining attorney made the refusal of registration final, applicant appealed and requested reconsideration, but the two filings were separated. The request for reconsideration was denied and the Board subsequently acknowledged the earlier filed appeal and reset applicant's time for filing a brief. Applicant and the examining attorney filed main briefs. Applicant attached new evidence to its reply brief and filed therewith a request for suspension and remand, so that the new evidence could be considered. The Board paralegal granted the request and provided the examining attorney with the opportunity to address the new evidence in a supplemental brief and the opportunity to submit additional evidence. The examining attorney did file a supplemental brief but did not submit any further evidence. Though applicant then was provided with the opportunity to file a supplemental reply brief, it did not do so; nor did applicant request a hearing.

In his supplemental brief, the examining attorney objects to the submission by applicant of additional

[1] Registration no. 2285718 issued October 12, 1999.

evidence with the reply brief, arguing that the record is to be complete prior to appeal. It ought to have been clear, however, from the Board order granting applicant's request for remand – which order also provided the examining attorney with the opportunity to file the supplemental brief – that the evidence attached to applicant's reply brief was being admitted into the record. If the examining attorney intended to object to some of the evidence as beyond the scope of the remand, the examining attorney's objection ought to have been more specific. We have not excluded from our consideration any of the evidence submitted by the applicant.

Notwithstanding that we have considered all of applicant's evidence, we disagree with applicant's analysis of the record and application of the law to this case. We affirm the refusal of registration.

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. See In re E.I. du Pont de Nemours and Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973); see also, In re Majestic Distilling Co., 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In the analysis of likelihood of confusion presented by this case, key considerations are

the similarities of the marks and the overlapping nature of the goods, i.e., the application seeks registration of applicant's mark for "beer and malt liquor" and "beer" is one of the three items listed in the cited registration. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

It is significant that the involved goods are, in part, identical. "When marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines." Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). We turn, then, to consider the marks.

The examining attorney has argued that applicant's mark consists of a combination of the descriptive initials HG and the arbitrary term VIPER. Applicant argued in its reply brief that the examining attorney is precluded from arguing that HG is descriptive because he withdrew the original requirement for a disclaimer of the initials, such requirement having been based on the examining attorney's initial determination that HG is descriptive. Further, applicant argues that HG must be considered arbitrary and that the VIPER element in its composite mark is arguably descriptive for alcoholic beverages. As can be seen from

this clash of views, applicant considers HG to be the dominant portion of its mark, while the examining attorney considers VIPER to be the dominant portion of the mark.

The examining attorney contends, in essence, that applicant has merely added the initialism HG, which indicates that applicant's goods are "high gravity" products, to the arbitrary term VIPER. In his supplemental brief, responding to applicant's assertion that the examining attorney had altered his position on the distinctiveness *vel non* of HG, the examining attorney explained that while he had withdrawn the requirement that applicant include a disclaimer of HG, he did so not because the initials are not descriptive but only because "there was not enough evidence to show that the term 'HG' was descriptive of beer." Supplemental Brief, unnumbered p. 2.

Applicant early on admitted that "[t]he initials HG in Applicant's mark stand for 'high gravity,'" but contended that merely because the phrase "high gravity" may be descriptive of applicant's goods it does not follow automatically that the initialism HG also is descriptive.[2] Response to initial Office action, p. 2. Moreover,

[2] There does not appear to be, nor could there be on the record in this case, any serious contention that "high gravity" is not descriptive of a feature of some beers, ales and stouts.

applicant argues that the examining attorney, because he withdrew the requirement for a disclaimer of HG, should be estopped from arguing that the initials are descriptive.

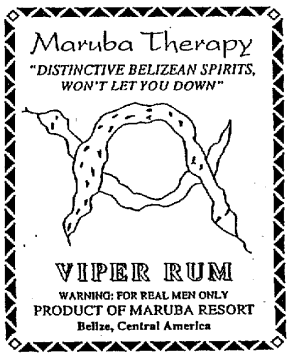
For purposes of this appeal, we do not consider the HG portion of applicant's mark to be descriptive.[3] Nonetheless, on the record in this case we find that the initials would at least be suggestive of a feature of applicant's goods. The examining attorney put into the record a copy of the recipes web page for San Francisco Brewcraft (www.sfbrewcraft.com/recipes) and this includes the statement "Recipes marked as (HG) are High Gravity Beers." Applicant has put into the record the results of various internet searches it has conducted to determine how frequently HG and High Gravity appear on the same web pages that discuss beers of various types. Based on these searches, applicant contends "the letters HG are connected with the concept of 'high gravity' less than one percent of the times when those letters are used with beer." Reply brief, p. 6. We are not persuaded by applicant's methodology that its survey of internet usage is a reliable basis upon which to conclude that in all uses in the beer

[3] In his final refusal, the examining attorney found applicant's argument against the requirement to disclaim HG "convincing," but did not affirmatively agree the initials were not descriptive. However, as already noted, the examining attorney also stated there was not sufficient evidence to prove descriptiveness.

industry, whether on the internet or not, the letters HG and the admittedly descriptive phrase "high gravity" are associated with each other only "one percent of the times when those letters are used with beer."

The results of applicant's various internet searches reveal that "high gravity" is used quite often to describe particular types of beer. How often the initials HG are used in association with, or in lieu of, the phrase, is unclear, although the use of the phrase appears to be far more widespread than the initials. Nonetheless, use of the initials is not infrequent and they are likely to suggest "high gravity" to consumers of beer.

Turning to the other element in applicant's mark – VIPER – the examining attorney contends this is arbitrary when used in conjunction with beer and therefore has more source-indicating capacity and is the dominant element in applicant's mark. Applicant argues that the "word VIPER has been disclaimed in at least one registration covering alcoholic beverages," specifically, Registration no. 2,391,799, for goods identified as "rum bottled with a snake in the bottle." That mark [a label design] is set forth below:



Applicant also notes that a web page report describing one individual's trip to Belize discusses drinking "Viper Rum, made from the venom of a viper, which included a baby viper in the bottle." (www.epinions.com) As a result, applicant concludes, "VIPER may not be totally arbitrary as applied to alcoholic products." Reply brief, p. 8.

Applicant makes too much of this snake in the glass, as "Viper Rum," whether a particular brand or a type of rum produced in Belize, clearly presents a different set of circumstances than is presented by VIPER beer or HG VIPER beer, where neither beer is alleged to have a viper in its bottle or viper venom in its recipe. There is no basis whatsoever for applicant's implication "that VIPER may not be totally arbitrary" when used in conjunction with beer.[4]

[4] Of course, if applicant were directly contending that VIPER is descriptive not just for "Viper Rum" but also when used in connection with beer, this would constitute an impermissible collateral attack on the cited registration. See In re Dixie

Another argument applicant advances as to why HG and not VIPER is the dominant term in its mark is its contention that beer producers, as a rule, typically use descriptive or suggestive terms or initials after their house marks or distinctive trademarks. While applicant, to support this contention, has introduced copies of web pages from three major brewers (in alphabetical order: Anheuser-Busch, Coors and Miller) the mere fact that these three brewers may tend to follow this pattern does not prove that the beer industry as a whole routinely places the most distinctive term in a mark in the front and the less distinctive term thereafter.

We are not persuaded that, in this case, we should view the suggestive initials HG, rather than the arbitrary term VIPER, as the dominant portion of applicant's composite mark HG VIPER. To the contrary, we agree with the examining attorney that VIPER is the dominant portion of the mark. It is a well-established principle that "there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests

---

Restaurants, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997). Such allegations can properly be raised only in the context of a petition to cancel a registration.

on consideration of the marks in their entireties." In re National Data Corp., 732 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

Comparison of marks requires consideration of the likely pronunciation of the marks, their visual similarities or differences, their connotations, and their overall commercial impressions. Giant Food, Inc. v. Nation's Foodservice, Inc., 710 F.2d 1565, 218 USPQ 390, 395 (Fed. Cir. 1983).

As to the sound of the marks, the VIPER portion of applicant's mark is identical to the mark in the cited registration and the HG initials, not forming a readily pronounceable acronym, may not routinely be articulated by consumers. Cf. Toro Co. v. ToroHead Inc., 61 USPQ2d 1164, 1167-68 (TTAB 2001) (prospective purchasers would pronounce the letters "MR" at the end of applicant's mark as individual letters). In calling for applicant's goods by name, it is much more likely that the dominant term VIPER would be used.

In terms of the look of the marks, again the term VIPER, being longer and more distinctive than the suggestive initials HG, would dominate. Moreover, because both applicant's mark and the registered mark are in typed form, we have to assume they can be presented in any

reasonable form of display. Phillips Petroleum Co. v. C. J. Webb, Inc., 442 F.2d 1376, 170 USPQ 35 (CCPA 1971); Jockey International Inc. v. Mallory & Church Corp., 25 USPQ2d 1233 (TTAB 1992). This means we must consider that the marks could be presented in the same type font or style, or even with the VIPER portion of applicant's mark displayed more prominently than the initials HG.

The connotations of the marks are virtually identical, as both connote a snake or viper. The presence of HG in applicant's mark, given its suggestiveness, does not alter the connotation of applicant's mark.

We conclude that the overall commercial impressions of the marks are very similar. Certainly, they are similar enough that there would be a likelihood of confusion given that the goods are the same and are a type of product that is often called for by name. See Schieffelin & Co. v. The Molson Companies Ltd., 9 USPQ2d 2069 (TTAB 1989) (BRADOR for malt liquor and BRAS D'OR for Cognac brandy creates likelihood of confusion where products may be ordered verbally in bars and restaurants and where consumers may believe one mark is a variation of the other).

Our conclusion that confusion is likely would not change even if we agreed with applicant that the registered mark is weak and entitled to only a narrow scope of

protection, for “even weak marks are entitled to protection against registration of similar marks” for identical goods or services. In re Colonial Stores, 216 USPQ 793, 795 (TTAB 1982). See also In re The Clorox Co., 578 F.2d 305, 198 USPQ 337, 341 (CCPA 1978) (ERASE for a laundry soil and stain remover held confusingly similar to STAIN ERASER, registered on the Supplemental Register, for a stain remover). We do not, however, agree with applicant that the registered mark is weak for "beer."

Applicant, in an attempt to establish that the mark in the cited registration is weak and entitled to only a narrow scope of protection, advances two major theories. First, it relies on the existence of a large number of registrations for the word VIPER per se, for a wide variety of goods or services, as support for its theory that VIPER per se should be accorded a narrow scope of protection. Second, applicant relies on two particular registrations for marks that include the word VIPER, and one registration for a mark that includes the letter string V-I-P-E-R. Under this theory, applicant contends that VIPER is utilized often enough as a component of marks for alcoholic beverages that it is weak when used in connection with such products.

As to the registrations of the word VIPER alone (with or without a design element), we do not agree that mere widespread registration of a particular term renders it inherently weak. If a number of registrations of a particular single word were for closely related goods or services, then the term might be considered suggestive for such goods or services, but not weak per se. In this case, among all the registrations of VIPER alone, only the cited registration covers any kind of beverage, alcoholic or not. Applicant certainly has not established that VIPER per se is weak for such goods.

As to applicant's contention that use of VIPER as a component of marks for alcoholic beverages renders it weak for such goods, applicant relies on the registration of HYPER VIPER, which covers, among a wide variety of goods and services in Classes 9, 16, 25, 28, 32 and 41, "beer"; on the registration of THE VIPER ROOM (with "Room" disclaimed) for restaurant, bar and nightclub services; and on the mark VIPEROSKA, registered under Section 44 of the Trademark Act for "alcoholic beverages, namely, liqueurs, whisky, gin, vodka and rum; prepared alcoholic cocktails; alcoholic malt coolers; wine coolers," in Class 33.

The last of these three registrations is not persuasive evidence that VIPER is weak for alcoholic

beverages because it is unlikely to be perceived as a VIPER mark, having instead the appearance of a foreign term. As to the registration of THE VIPER ROOM, applicant asserts it is probative on the question whether VIPER-formative marks are weak for alcoholic beverages because "[a]lcoholic beverages are sold at bars and nightclubs … and … some of these establishments sell their own private-label drinks." Reply brief, p. 9. Applicant, however, provides no support for this statement, and none appears in the record. Moreover, the Federal Circuit has found "that it is quite uncommon for restaurants and beer to share the same trademark." In re Coors Brewing Co., 343 F3d 1340, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003).

Finally, we consider the registration for HYPER VIPER, which covers, *inter alia*, "beer." The mere fact that VIPER and HYPER VIPER may both be registered for beer does not show that VIPER is a suggestive term for beer, nor is it sufficient to demonstrate that the cited registration is entitled to such a limited scope of protection that it would not extend to prevent the registration of HG VIPER for identical goods. Further, the coexistence of the VIPER and HYPER VIPER registrations does not mean that we must allow applicant to register a mark that is likely to cause confusion among consumers. See In re Nett Designs Inc.,

236 F3d 1339, 57 USPQ2d 1564 (Fed. Cir. 2001) ("Even if some prior registrations had some characteristics similar to Nett Designs' application, the PTO's allowance of such prior registrations does not bind the Board or this court."). See also, AMF Inc. v. American Leisure Products, Inc., 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973) ("We have frequently said that little weight is to be given such [third-party] registrations in evaluating whether there is a likelihood of confusion. The existence of these registrations is not evidence of what happens in the market place or that customers are familiar with them nor should the existence on the register of confusingly similar marks aid an applicant to register another likely to cause confusion, mistake or to deceive.").[5]

Decision: The refusal of registration under Section 2(d) of the Trademark Act is affirmed.

[5] Applicant also attempts to establish the weakness of the VIPER mark in the cited registration by referring to the existence of registrations for VIPER BLAST and VIPER VENOM, both owned by the same party. These are registered for "candy" and cannot possibly show that VIPER-formative marks are weak for beer.